

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, APPELLANT

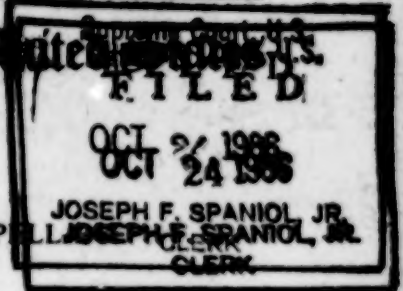
v.

CHRISTINE J. AMOS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*



## TABLE OF AUTHORITIES

Cases:	Page
<i>Bowen v. Roy</i> , No. 84-780 (June 11, 1986) .....	3
<i>Estate of Thornton v. Caldor, Inc.</i> , No. 83-1158 (June 26, 1985) .....	3
<i>Goldman v. Weinberger</i> , No. 84-1097 (Mar. 25, 1986) ...	3
<i>Tony &amp; Susan Alamo Foundation v. Secretary of Labor</i> , 471 U.S. 290 .....	3
<i>United States v. Lee</i> , 455 U.S. 252 .....	3
<i>Walz v. Tax Comm'n</i> , 397 U.S. 664 .....	3
<i>Welsh v. United States</i> , 398 U.S. 333 .....	4
<i>Zorach v. Clauson</i> , 343 U.S. 306 .....	3
Constitution and statute:	
U.S. Const. Amend. I:	
Establishment Clause .....	1, 2, 3, 5
Free Exercise Clause .....	3
Civil Rights Act of 1964 § 702, 42 U.S.C. 2000e-1 .....	1, 2, 3, 4, 5



# In the Supreme Court of the United States

OCTOBER TERM, 1986

---

No. 86-401

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE J. AMOS, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH*

---

## REPLY MEMORANDUM FOR THE UNITED STATES

---

We demonstrated in our jurisdictional statement that the district court erred by concluding that Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, violates the Establishment Clause in permitting religious organizations to engage in discrimination in employment on the basis of religion in connection with their secular activities. Appellees have not overcome our showing that plenary review of the district court's decision is plainly warranted.

1. Appellees first attempt to paint the decision below as a limited fact-bound determination. They state that "[t]he district court has decided only that § 702 is unconstitutional as applied to [appellee] Mayson's employment at the Gym" (Mot. to Aff. 8), and repeatedly characterize the decision below as a narrow one (*id.* at 2, 9, 23-24). Appellees are of course correct that the only Title VII claim finally resolved by the district court was the claim asserted by appellee Mayson, but the district court's determination regarding the constitutionality of Section 702 clearly extends far beyond the particular facts of appellee Mayson's claim.

The only context in which the district court discussed the particular facts of appellee Mayson's claim was when it considered whether the Deseret Gymnasium constitutes a religious or secular activity (see J.S. App. 11a-18a).<sup>1</sup> After concluding that the Gymnasium is a secular activity, the court addressed the broad question whether the application of Section 702 to the secular activities of religious institutions violates the Establishment Clause (J.S. App. 21a-75a). The court concluded that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution" (*id.* at 75a).

Thus, far from reaching a narrow fact-bound determination, the district court concluded that Section 702 may not constitutionally be applied to *any* secular activity conducted by a religious institution. This quite substantial narrowing of the provision effectively repeals the 1972 amendment to Section 702, thwarting Congress's express desire to include the secular activities of religious institutions within the exemption set forth in Section 702 (see J.S. 18-19).

2. Appellees also assert that plenary review by this Court is not necessary because the district court's decision is "clearly correct" (Mot. to Aff. 9). But appellees do not identify a decision of this Court that controls the district court's constitutional determination; indeed, appellees fail to rebut our showing that the district court's decision cannot be squared with this Court's precedents.

As we discuss in detail in our jurisdictional statement (at 11-17), this case presents an important question concerning Congress's authority to exempt religious organizations

---

<sup>1</sup> "J.S. App." refers to the appendix to the jurisdictional statement filed by the private appellants, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, No. 86-179.

from generally applicable regulatory requirements in situations in which such an exemption is not compelled by the Free Exercise Clause. This Court previously has found no violation of the Establishment Clause arising from some exemptions of that type. See, e.g., *United States v. Lee*, 455 U.S. 252, 260 & n.11 (1982); *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970); *Zorach v. Clauson*, 343 U.S. 306 (1952).

Appellees' basic response to our argument is their assertion (Mot. to Aff. 19) that this Court frequently has "invalidated or denied" exemptions drawn on religious lines. They attempt to support this position by citing decisions of this Court holding that—in the particular circumstances of each case—the Free Exercise Clause did not require the adoption of a religion-based exemption. E.g., *Bowen v. Roy*, No. 84-780 (June 11, 1986); *Goldman v. Weinberger*, No. 84-1097 (Mar. 25, 1986); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985); *United States v. Lee*, *supra*. But Congress *did* adopt such an exemption when it enacted Section 702, and this case therefore presents a different question—whether the Establishment Clause prohibits Congress's action. Since the Court has made clear that Congress's authority to accommodate religion is not limited to those measures required by the Free Exercise Clause (see J.S. 11-12, 17), decisions interpreting the Free Exercise Clause obviously do not control this case.<sup>2</sup>

---

<sup>2</sup> *Estate of Thornton v. Caldor, Inc.*, No. 83-1158 (June 26, 1985), did overturn on Establishment Clause grounds a state statute requiring employers to accommodate the religious beliefs of their employees. As we discuss in our jurisdictional statement (at 16-17 n.12), the statute at issue in *Thornton* violated the Constitution because it endorsed a specific religious practice and compelled private individuals to accommodate that practice. Section 702 does not have either of these impermissible effects. Thus, contrary to appellees' claim (Mot. to Aff. 21), appellees are not in the same position as the private employers affected by the statute in *Thornton*; they need not

Appellees also assert that Section 702 impermissibly advances religion because it allows a religious institution "to extract from [its] secular employees religious obedience and substantial economic concessions" (Mot. to Aff. 17).<sup>3</sup> We addressed this issue in our jurisdictional statement (at 13-17, 19) and will not repeat that discussion here. It is

---

adjust their affairs to satisfy requirements imposed for religious reasons, but may instead seek other employment.

*Welsh v. United States*, 398 U.S. 333 (1970), another case cited by appellees to support their claim that religion-based exemptions generally violate the Constitution, plainly does not stand for that proposition. A plurality of four Justices decided the case on statutory grounds, concluding that Congress intended to exempt from the draft persons who object to military service on grounds of public policy as well as persons who object on religious grounds (398 U.S. at 335-344). Only Justice Harlan concluded that an exemption limited to persons who opposed military service on the basis of their religious beliefs would violate the Establishment Clause (*id.* at 356-361). Three Justices rejected this view of the constitutional issue, concluding that such an exemption would not effect an establishment of religion (*id.* at 369-374 (White, J., dissenting)).

<sup>3</sup> Appellees' defense of the district court's decision is somewhat narrower than the decision itself. Thus, although the district court did not rely upon the particular religious requirement involved in this case in finding that Section 702 had the impermissible effect of advancing religion (see J.S. App. 72a-74a), appellees emphasize the economic effect of the tithing obligation that is one of the religious requirements of The Church of Jesus Christ of Latter-day Saints (see Mot. to Aff. 17, 25-27). In our view, the constitutionality of Section 702 cannot turn upon the requirements of the particular religious institution. That result would involve the courts even more deeply in the examination of religious beliefs than the blanket restriction of Section 702 adopted by the district court. We note, moreover, that the link between religious beliefs and secular activities that is the basis for appellees' argument (Mot. to Aff. 25-26) strongly supports Congress's decision to adopt the broad exemption contained in Section 702. It demonstrates that the secular activities of a religious organization frequently serve religious as well as secular purposes and, therefore, lends support to Congress's decision to avoid entanglement by obviating any distinction by courts between religious and secular activities.

noteworthy, however, that appellees have not pointed to any decision of this Court indicating that the particular effects that appellees attribute to Section 702 are sufficient to demonstrate a violation of the Establishment Clause. Indeed, the dispute about the merits of this constitutional question only confirms that plenary review is warranted in this case.<sup>4</sup>

For the foregoing reasons, and the reasons set forth in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

CHARLES FRIED  
*Solicitor General*

OCTOBER 1986

---

<sup>4</sup> Appellees' references (Mot. to Aff. 23) to our brief in the district court might convey the erroneous impression that we agreed with the district court that Section 702 is unconstitutional as applied to appellee Mayson's claim. The portion of our brief cited by appellees has nothing to do with that question. It discusses the entanglement between government and religion that would result if the Section 702 exemption applied only to religious activities and a court therefore was required to classify an activity as religious or secular in order to determine whether the exemption was available (see U.S. Dist. Ct. Br. 30-33). We observed that labeling the Deseret Gymnasium as a secular activity might appear to be "relatively easy," but that other employment contexts would raise more difficult questions and therefore require "greater intrusion into church affairs" (*id.* at 32). We thus in no way conceded that Section 702 cannot constitutionally be applied to appellee Mayson's Title VII claim.